

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

STEVEN R. KINCAID,	)	
	)	
Plaintiff,	)	CA No. 04 CV 11522 WGY
	)	
vs.	)	
	)	
BANK OF AMERICA CORPORATION,	)	
	)	
Defendant.	)	
	)	

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant, Bank of America Corporation ("Bank of America" or "the Bank"), hereby moves for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

In support of this Motion For Summary Judgment, Defendant states as follows:

1. Plaintiff's Complaint alleges four causes of action: (1) age discrimination in violation of 29 U.S.C. § 621 *et seq.*; (2) retaliation in violation of 29 U.S.C. § 623(d); (3) wrongful discharge in violation of the public policy of North Carolina; and (4) breach of an implied covenant of good faith and fair dealing under North Carolina law.

2. Bank of America terminated Plaintiff for poor performance. Plaintiff's discharge followed numerous efforts to improve his performance, a negative performance review, and a counseling memorandum warning Plaintiff that he was subject to discharge if his performance did not improve. Bank of America hired Plaintiff when he was 49 years of age and terminated him within nine months while he was still 49 years of age.

3. Plaintiff is unable to produce any evidence from which a reasonable juror could conclude that Bank of America terminated him because of his age, retaliated against him for

complaining of age discrimination, or that his termination violated public policy. In addition, because North Carolina does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing under the circumstances of this case, Plaintiff cannot establish a claim under such theory.

In further support of this Motion For Summary Judgment, Defendant refers to and incorporates Defendant's Memorandum of Law In Support Of Its Motion For Summary Judgment and Defendant's Statement of Material Facts In Support Of Its Motion For Summary Judgment, filed herewith.

WHEREFORE, Defendant requests the Court enter an Order granting this Motion For Summary Judgment; dismissing Plaintiff's Complaint with prejudice, awarding it the costs incurred in this action, including its reasonable attorneys' fees; and granting such other relief as the Court deems just and proper.

#### **REQUEST FOR HEARING**

Defendant requests a hearing on this Motion For Summary Judgment.

Respectfully submitted,  
Bank of America Corporation,  
Defendant  
By its attorneys,

/s/ Siobhan Sweeney  
Siobhan Sweeney  
BBO No. 562118  
Edwards & Angell, LLP  
101 Federal Street  
Boston, MA 02110  
Phone: 617.439.4444  
Fax: 617.439.4170

Richard F. Kane (admitted pro hac vice)  
Steven T. Ackermann (admitted pro hac vice)  
McGuireWoods LLP  
Bank of America Corporate Center  
100 North Tryon Street, Suite 2900  
Charlotte, North Carolina 28210  
Telephone: 704.373.8999  
Facsimile: 704.373.8827

Dated: October 21, 2005

Certification of Conference Pursuant to LR 7.1

I hereby certify that prior to filing, the parties, through their counsel, have conferred with respect to Defendant's Motion For Summary Judgment and the issues raised therein, in an effort to narrow the areas of disagreement.

/s/ Siobhan Sweeney